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No. 83-400

In the Supreme Court of the United States

OCTOBER TERM, 1983

J.H. RUTTER REX MANUFACTURING CO., INC.,
PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioner contends that its past performance of Department of Defense contracts to manufacture apparel affords it a permanent, constitutionally protected, "entitlement to future opportunities to bid on such contracts" (Pet. 12) without regard to Defense Department regulations, authorized by statute, that "set aside" certain government contracts for bidding by small business concerns.

1. Most government procurement contracts are awarded on the basis of competitive bidding open to interested parties without regard to the economic size of the bidder. In 1948, however, Congress enacted the Armed Services Procurement Act, 10 U.S.C. 2301 *et seq.*, which states "the policy of Congress that a fair proportion of the purchases

and contracts under this chapter be placed with small business concerns." 10 U.S.C. 2301(b).[1] To implement the "fair proportion" requirement, in 1958, the Secretary of Defense promulgated the Defense Acquisition Regulations, 32 C.F.R. 1-700 *et seq.*[2] The Secretary's regulations embody a variety of strategies for increasing small business participation in government procurement.[3] At issue here are provisions directing that certain government contracts be "set aside for the exclusive participation of small business concerns" (32 C.F.R. 1-706.1(b)). The regulations mandating these "set-asides" provide (32 C.F.R. 1-706.5(a)(1)):

> [T]he entire amount of an individual acquisition or class of acquisitions * * * shall be set aside for exclusive small business participation (1-701.1) if the contracting officer determines that there is a reasonable

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[1]The purpose of this policy was to insure that the small businesses that had developed to meet the nation's needs during the Second World War would not disappear in the absence of the demand created by full mobilization, undermining national preparedness:

> The [Armed Services Procurement Act] will aid in the development of a larger number of known and capable suppliers geographically spread over the entire country, thus affording added production security in the event of any emergency and assist in establishing insurance against acute production bottlenecks.

S. Rep. 571, 80th Cong., 1st Sess. 6 (1947). Congress extended the "fair proportion" policy to government contracts generally in the Federal Property and Administrative Services Act of 1949, 41 U.S.C. 252(b), and the Small Business Act of 1958, 15 U.S.C. 631(a) and 644(a).

[2]The Defense Acquisition Regulations were formerly known as the Armed Services Procurement Regulations.

[3]These strategies include publicizing of contracting methods and practices, dividing acquisitions into lots smaller than the government's total requirements, and maintaining liaison with other federal, state and local agencies to channel information and assistance to small businesses. 32 C.F.R. 1-702(b).

> expectation that (i) offers will be obtained from at least two responsible small business concerns offering the products of different small business concerns and (ii) awards will be made at reasonable prices (1-706.3(a)).

In 1979, the set-aside procedure was simplified to some extent. The regulations were amended to provide that where bidding on a particular item had been set aside for small businesses in the past, it would continue to be set aside in the future as long as the required conditions of competition and price are met. 32 C.F.R. 1-706.1(f).[4]

2. Petitioner is a business concern, engaged in the manufacture of apparel, that employs more than 1500 people and is accordingly not eligible to bid on contracts for clothing that have been set aside for small business participation (Pet. App. A3). Petitioner alleges that it has manufactured apparel procured by the Department of Defense for 40 years, and that one of its plants has been "almost exclusively" devoted to production of apparel produced for the Department of Defense (Pet. 3), but that because of the government's small business preference program, it is no longer certain to be able to bid on a significant number of apparel procurement contracts.[5]

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[4]The cited regulation provides in pertinent part:

> Once a product or service has been acquired successfully by a contracting office on the basis of a small business set-aside, all future requirements of that office for that particular product or service * * * shall be acquired on the basis of a repetitive set-aside. This procedure will be followed unless the contracting officer determines that there is not a reasonable expectation that (i) offers will be obtained from at least two responsible small business concerns offering the products of different small business concerns and (ii) awards will be made at reasonable prices.

[5]Petitioner does not deny that it continues to have opportunities to bid on some Department of Defense procurement contracts for apparel (Pet. 5 n.1).

Petitioner brought this action in the United States District Court for the Eastern District of Louisiana alleging, as it does in this Court, that this "extended business relationship" affords it "a legitimate claim of entitlement to future opportunities to bid on" Defense Department procurement contracts for military apparel (Pet. 12), and that the Department of Defense's 1979 "repetitive set-aside regulations completely and permanently foreclose [its] future opportunity to bid on procurement contracts for products that it supplied to the DOD for over forty years" (Pet. 18). Petitioner argued that the regulations effect a deprivation of "its property entitlement without due process" (Pet. 17-18).[6]

Both the district court (Pet. App. A36-A37) and the court of appeals (*id.* at A21-A23) rejected petitioner's constitutional contention on the ground that petitioner had failed to demonstrate anything more than a unilateral expectation that it would be able in the future to continue to bid on a satisfactory number of procurement contracts.

3. The courts below correctly rejected petitioner's contention. As petitioner recognizes (Pet. 7-8, 10), *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972), sets forth the conditions that must be met to establish an entitlement or property interest entitled to due process protection:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. * * *

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[6]In addition to its constitutional claim, petitioner unsuccessfully argued below that the challenged procurement regulations exceed the statutory authority of the Secretary of Defense. Petitioner has abandoned that claim in this Court (Pet. 7).

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Petitioner thus must be able to identify some basis that rises above unilateral expectation to support his claim of entitlement to bid on government contracts without regard to the Department of Defense's small business set-aside regulations. Petitioner appears to contend (Pet. 12) that this source is the Department of Defense regulations as they existed prior to certain changes effected in 1979, and the mere fact that petitioner has in the past been eligible to bid on a broader range of Department of Defense procurement contracts.[7]

Petitioner's contention is insubstantial. The implication of petitioner's argument is that the government may never alter its procurement regulations and practices if the change would disadvantage someone who has bid on contracts in the past — even though the revised regulations are

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[7]The gist of petitioner's quarrel with the decision below is that the court of appeals failed explicitly to acknowledge that under some circumstances mutual understandings not traceable to any statute or regulation may support a claim of entitlement (Pet. 15-16). But as we explain in the text, petitioner's assertion that it had a right to continue to bid on procurement contracts without regard to Department of Defense small business set-aside regulations rests on nothing more than a highly unreasonable "subjective 'expectancy' " that is unprotected by the Due Process Clause. *Perry* v. *Sindermann*, 408 U.S. 593, 603 (1972).

authorized by statute.[8] We are unaware of any authority for such an astounding proposition, and petitioner cites none.[9] Similarly, the mere fact that petitioner previously was awarded contracts for the procurement of apparel does not reflect any mutual "understanding" that petitioner would be allowed to bid on contracts in the future. Procurement contracts are limited by their terms to the particular goods and services specified; absent some express provision to the contrary, such contracts do not purport to fix the relations of the parties for all time. Petitioner has not alleged that the procurement contracts it was awarded contained any such special provisions. Nor does it allege that anything in the regulations in effect prior to 1979 created a basis for any expectation that the regulations would not be altered.

4. Petitioner substantially exaggerates the differences between the procurement regulations in effect prior to 1979 and those currently in effect. A comparison of the earlier regulations with the present ones confirms that petitioner never had any "right" to bid on apparel contracts without

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[8]There is no claim here that petitioner was denied any opportunity to be heard respecting regulatory changes. Rather, petitioner's claim is that the government may not "abridge" his "right" to bid on every contract.

[9]As the court of appeals observed (Pet. App. A22 n.22):

> The cases cited by [petitioner] do not support its claim. The cases may be categorized as standing for one of the following holdings. First, that a person who contends that he or she was invalidly denied access to the government bidding process possess[es] standing to bring an action challenging such denial. *Copper Plumbing & Heating Co. v. Campbell*, 290 F.2d 368 (D.C. Cir. 1961). Second, that a person may not be denied access to the government bidding process absent procedural regulations authorizing or governing such denial. *Gonzalez v. Freeman*, 334 F.2d 570 (D.C. Cir. 1964). Finally, that when Congress delineates specific qualifications for potential bidders, a person may not be denied access to the bidding process if he or she meets those qualifications. *Schraier v. Hinkel*, 419 F.2d 663 (D.C. Cir. 1969).

regard to the statutory policy favoring small businesses. Beginning in 1958, whenever there was a reasonable expectation that bids on a proposed acquisition would be received from a "sufficient number of responsible small business concerns so that awards will be made at reasonable prices," the contract was set-aside for small businesses. See, *e.g.*, 32 C.F.R. 1.706-5(a) (1961). In 1979, the regulations were amended to trigger the set-aside procedure whenever it is expected that "at least two" responsible small business concerns will bid on a proposed acquisition and that the award can be made at reasonable prices. 32 C.F.R. 1-706.5(a)(1). Prior to 1979, the regulations required a case-by-case determination that the requisite number of responsible small business bidders existed to trigger the small business set-aside. As indicated above (page 3 & note 4, *supra*), the present regulation allows contracts for items that had been awarded to small businesses in the past to be set aside on subsequent occasions unless there is reason to believe that the requirements of numerosity of bidders and reasonableness of prices will not be met.[10] Certainly nothing in the pre-1979 regulations created any basis for petitioner to conclude that procedural changes such as these would not be effected from time to time, or that it would always be able to bid on apparel contracts without regard to the small business set-aside.

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[10] Petitioner's selective quotation of the pertinent regulation (Pet. 4-5) creates the impression that all contracts for items once set aside for small businesses are forever subject to the set-aside. In fact, the requirements of numerosity of bidders and reasonableness of prices remain effective. See page 3 & note 4, *supra*.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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